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IN THE

SUPREME COURT OF THE UNITED STATES

No. 878

MAYLON B. CLINKSCALES,
Appellant,

vs.

THE STATE OF GEORGIA,
Appellee.

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF APPEALS OF GEORGIA.

PETITION AND ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT ON BEHALF OF APPELLANT, MAYLON B. CLINKSCALES.

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(a)

REFERENCE TO OFFICIAL REPORT.

The opinion sought to be reviewed by this petition for writ of certiorari was rendered by the Court of Appeals of Georgia and is reported as the case of Clinkscales v. The State of Georgia, 104 Ga. App. 723. A copy of the official report is appended hereto. A petition for writ of certiorari was filed to the Supreme Court of Georgia, and same was denied without opinion. A petition for recon-

sideration was filed in the Supreme Court of Georgia, and same was denied without opinion on January 22nd, 1962.

(b)

GROUNDS OF JURISDICTION.

The opinion sought to be reviewed, entitled Clinkscales vs. The State of Georgia, Number 39126, is dated October 11th, 1961, and motion for rehearing was denied October 31st, 1961, in the Court of Appeals of Georgia. Petition for writ of certiorari was filed to the Supreme Court of Georgia and denied without opinion, and motion for reconsideration was filed to the Supreme Court of Georgia and denied without opinion on January 22nd, 1962.

The jurisdiction of this Court is invoked under Title 28, U.S.C. 1254 (1), and by virtue of the Supreme Court Rules, Rule 19 (1) (B), Title 28, U.S.C.

Jurisdiction of this Court is invoked because the Court of Appeals of Georgia has rendered a decision in conflict with applicable laws of the State of Georgia and has so far departed from the accepted and usual course of judicial proceeding and so far sanctioned such a departure by the lower Court, as to call for the exercise of this Court's power of supervision.

The Court of Appeals of Georgia has held in the case here sought to be reviewed that in a case of disbarment of an attorney at law, under the laws of the State of Georgia, where issues of fact are involved and disbarment depends upon issues of fact, that notwithstanding the statute providing for a jury to try the issues and resolve the issues of fact, a trial judge may direct a verdict of "guilty" and order disbarment of the attorney.

This decision of the Court of Appeals of Georgia is in sharp conflict with the decision of *James* v. *State*, 61 Ga. App. 860, and with the statute enacted by the legislature providing for jury trials in cases of disbarment, Georgia Code Section 9-513; and is in sharp conflict with the purport and intent of the 14th Amendment to the Constitution of the United States, providing due process and equal protection of the laws to all citizens.

By virtue of the laws of the State of Georgia (Georgia Code 24-4558), the denial of a writ of certiorari by the Supreme Court of Georgia shall not be taken as an adjudication that the decision or judgment of the Court of Appeals of Georgia is correct. The Supreme Court of Georgia has a wide discretion in passing upon petitions for writ of certiorari, but in order to invoke the jurisdiction of this Honorable Court, all available remedies in the Courts of Georgia have been exhausted.

(c)

QUESTIONS PRESENTED.

1.

Where, in disbarment proceedings, the statute of the State of Georgia provides for a trial of the issues by a jury, if a jury is demanded, and the accused demands a jury to try the issues, and a jury is impaneled to try the case, may the trial judge, at the close of the evidence, withdraw the issues from the jury's consideration and direct a verdict of guilty and disbarment?

2.

Where, in disbarment proceedings, the law of the State of Georgia provides a trial of the issues by a jury, if a jury is demanded and the accused demands a jury to try the

issues, and a jury is impaneled to try the case, is the accused afforded due process of law and equal protection of the laws, as contemplated by the 14th Amendment to the United States Constitution, when the trial judge withdraws the issues from the jury's consideration and directs a verdict of guilty and disbarment?

(d)

STATUTES INVOLVED.

Georgia Code 9-505.

> "9-505. (4969) *Proceedings to remove attorney; motion.*—The proceedings to remove an attorney may be taken by the court of its own motion, or upon the motion of an attorney at law, or other citizen."

Georgia Code 9-506.

> "9-506. (4978) *Proceedings to be conducted in name of the State.*—The proceedings, when instituted by the court of its own motion, are conducted in the name of the State—the solicitor appearing to sustain the accusation; and when on the information of another, in the name of the State on the information of such person."

Georgia Code 9-507.

> "9-507. (4970) *Accusation to be in writing; signature.*—The accusation must be in writing, signed by the movant or his attorney at law; and when the proceeding is taken by the court, it may be drawn up by the solicitor or the clerk, under the direction of the court."

Georgia Code 9-508.

> "9-508. (4971) *Verification of accusation.*—If the proceedings are upon the information of another, the accusation must be verified by the informant or by some person on his behalf and presented to the court."

Georgia Code 9-509.

"9-509. (4972) *Order for appearance.*—The court must then, if of opinion that the accusation would, if true, be ground for removal, make an order requiring the accused to appear and answer the same at a specified day during the same or at the next term, and must cause a copy of the order and accusation to be served on the accused within a prescribed time before a day appointed in the order."

Georgia Code 9-510.

"9-510. (4973) *Appearance by accused; effect of failure to appear.*—The accused must appear at the time appointed in the order, and answer the accusation, unless, for sufficient cause, the court assign another day for that purpose; if he does not appear, the court may proceed and determine the accusation in his absence."

Georgia Code 9-511.

"9-511. (4974) *Answer of accused; entry on minutes.*—The accused may answer, either by objecting to the sufficiency of the accusation, or by denying its truth—either of which must be entered on the minutes."

Georgia Code 9-512.

"9-512. (4975) *Answer by accused.*—If the objection to the sufficiency of the accusation be not sustained, the accused must answer it forthwith."

Georgia Code 9-513.

"9-513. (4976) *Plea or refusal to answer; trial by jury.*—If he pleads guilty, or refuses to answer the accusation, the court must proceed to judgment of removal; if he denies the accusation, the court must immediately, or at such time as it may appoint, pro-

ceed to try the same—the accused having a right to demand a trial by jury."

Georgia Code 9-514.

"9-514. (4979) *Witnesses compelled to attend; security for costs; dismissal.*—Either party has a right to subpoenas and other process to compel the attendance of witnesses, and testimony may be taken by deposition in such cases and in the same manner as in actions at law, and the court may, in its discretion, require the informant to give security for costs; and failing so to do within the time prescribed, the proceedings must be dismissed at the cost of the informant."

Georgia Code 9-515.

"9-515. (4981) *Proceedings upon death of informant.*—Upon the death of the informant, if there be but one, the proceedings abate, unless some other person is substituted in his place, which may be done on application to the court; if there is more than one informant, the proceedings continue on the information of the survivor."

Georgia Code 9-516.

"9-516. (4982) *Malicious proceedings.*—It is in the province of the jury who try such proceedings, if they find in favor of the accused, also to find they were malicious, if they so believe; and upon such finding, the rights of the accused against the informant are the same as in cases of malicious prosecution on the criminal side of the court."

Georgia Code 9-517.

"9-517. (4977) *Effect of judgment; new trial; review.*—A judgment of acquittal is final; but from a judgment of removal there may be a motion for a new trial, and a review by the Court of Appeals as in other cases."

Georgia Code 9-518.

"9-518. (4980) *Costs, how taxed and collected.*— When the proceedings are in the name of the State, the costs are paid as in criminal cases; when in the name of the State on the information of another, if the accusation is not sustained, judgment is rendered against the informant and his security for the costs, if the same has been given; but if the accusation is sustained against the accused, judgment for costs must be rendered against him."

Constitution of State of Georgia, Article VI, Section IV, Paragraph VII, Georgia Code 2-3907 (See Appendix.)

Constitution of State of Georgia, Article VI, Section XVI, Paragraph I, Georgia Code 2-5101 (See Appendix.)

Constitution of United States, Article XIV, Section 1 (See Appendix.)

(e)

STATEMENT OF THE CASE.

Maylon B. Clinkscales, Appellant, was the duly elected and qualified Judge of the Piedmont Judicial Circuit of Georgia. In July of 1959, a petition seeking his disbarment was filed against him by certain named citizens, alleging various acts of misconduct by him. Among the acts of alleged misconduct was the following:

"During the first part of the year 1958, one Vaughn Cannon, President of Andrew Jackson Hotel, Inc., in Commerce, Jackson County, Georgia, 'a dry county', had established in the basement of said hotel premises club headquarters, in which was to be located a bar for the sale and dispensation of alcoholic beverages and slot machines, which said premises were to be leased to a local chapter of the Royal Order of Moose; in connection with said endeavor, the said Vaughn

Cannon, upon suggestions of parties, all to the said Maylon B. Clinkscales well known, conducted conferences with the said Maylon B. Clinkscales, in which said conferences the said Maylon B. Clinkscale, advised and proposed to the said Vaughn Cannon that for and in consideration of $10,000.00 in cash and $500.00 per month thereafter, paid and to be paid to the said Maylon B. Clinkscales that the said Vaughn Cannon could and would be protected in the operation of said headquarters, bar and slot machines."

Upon the filing of said petition for disbarment, pursuant to the laws of the State of Georgia, Appellant disqualified himself to preside in said matter. Appellant was subsequently defeated in his bid for re-election, and a judge from another Judicial Court of Georgia, Honorable F. Frederick Kennedy of the Augusta Judicial Circuit, was called in to preside in said case.

Appellant filed his answer to the petition for disbarment, in which he denied each and every allegation against him, in writing, under oath. The denial of Appellant set forth in particularity each and every item denied and constituted a denial of each and every allegation of the petition for disbarment. The case was set for trial at the February Term, 1961, of the Superior Court of Jackson County, Georgia. A jury trial was demanded by Appellant, as provided by law, and on the 6th day of February, 1961, said case came on for trial in said Superior Court, before a jury impaneled to try said case.

Upon the trial of the case before a jury, as aforesaid, the Appellant here appeared in person and was represented by counsel and cross-examined the witnesses appearing against him and offered no other evidence other than his sworn denial of the charges against him. At the close of the evidence for the State of Georgia, the Appel-

lant here moved for a directed verdict of acquittal, which was denied. The State of Georgia moved for a directed verdict of "guilty" and disbarment, which was by the Court granted, and judgment was entered against Appellant on the 9th day of February, 1961, disbarring him from the practice of his profession as an Attorney at Law and ordering Appellant's name stricken from the registry of qualified attorneys of the State of Georgia.

After the above verdict and judgment of disbarment was entered against him, Appellant filed his motion for new trial urging the error of the trial Court in directing a verdict against him for the reason that there were issues of fact which should have been submitted to the jury. Other grounds of error were alleged, among them that the evidence was insufficient to warrant a judgment of disbarment as a matter of law, fact and equity. Said motion for new trial was overruled and the case duly taken to the Court of Appeals of Georgia.

The Court of Appeals of Georgia rendered the opinion appended hereto. Motion for rehearing was filed and denied without opinion. A petition for writ of certiorari was filed in the Supreme Court of Georgia and denied without opinion. Motion for reconsideration of the denial of the petition for writ of certiorari was filed in the Supreme Court of Georgia, and same was denied without opinion on the 22nd day of January, 1962. The case is now before this Honorable Court for review.

(f)

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT.

1.

As above cited, the statute of Georgia, Georgia Code 9-513, provides the accused, in disbarment proceedings, with the right to trial by jury, if he demands a jury trial. In the cause here, Appellant was accused of certain acts, criminal in nature; the accusation was filed under the authority granted by Georgia statutes, Georgia Code 9-505 through 9-518; the Appellant filed his sworn denial to each and every allegation against him, and demanded a jury trial; a jury was provided, sworn and impaneled; the evidence was presented by the State and the witnesses cross-examined by Appellant, through his counsel; and at the conclusion of the evidence, the Court withdrew the case from the consideration of the jury and directed a verdict of guilty and judgment of disbarment.

The question now presented by the Appellant deals with the right of a Court to direct a verdict of guilty and disbarment and the Appellant's right to due process and equal protection of the laws, when the statute provides for trial by jury.

The right to practice law in the Courts of Georgia is regulated by statute, Georgia Code Sections 9-101 through 9-132. The procedure for removal and disbarment of attorneys in the State of Georgia is regulated by statute, Georgia Code Sections 9-501 through 9-518, among the provisions the following:

> Georgia Code Section 9-513. "*Plea or refusal to answer; trial by jury.*—If he pleads guilty, or refuses to answer the accusation, the court must proceed to judg-

ment of removal; if he denies the accusation, the court must immediately, or at such time as it may appoint, proceed to try the same—the accused having a right to demand a trial by jury."

Appellant insists that the provision of the above quoted statute gives him the right to have a jury pass upon the issues of his guilt or innocence in a disbarment proceeding; that due process of law demands strict compliance with the statute prescribing the rights of the accused in disbarment proceedings. If this is not true, then the provision for jury trial is a farce and is meaningless. The right of trial by jury has been followed by the Georgia Courts; in fact the very question has been presented to the Court of Appeals of Georgia, and it held this right to a jury trial, in disbarment proceedings, to be inviolate.

"It is not that this court would indulge for a moment in the thought that the respondent would not be given as fair and impartial a hearing by the five able and learned Superior Court judges as by any tribunal before which he might be tried; but it has always been the system of our jurisprudence in this State, as authorized by our constitution, to adhere to a trial by a jury in any case involving an issue of fact, where the legislature has provided for a jury trial in such proceeding. As above pointed out, the Code, Section 9-513, provides that an attorney at law may respond by answering and denying the charges made against him in a proceeding to disbar him, and when he does he is entitled to a trial by a jury. On an application of the law to the facts as contained in the pleadings in the present case, we are of the opinion that the respondent was entitled to a trial by a jury, and that the court erred in refusing his demand in this respect."

James v. *State*,
61 Ga. App. 860, 864.

The above cited decision of the Court of Appeals of Georgia was a disbarment and suspension proceeding against an attorney at law. The accused demanded a jury trial and same was refused him. Instead, a panel of five Superior Court Judges was appointed to try the accused. Even here, the Court recognized the right of the accused to a trial by jury and so ordered. We insist that the Appellant, in the cause here under review, in order to afford him equal protection of the laws and due process of law, is entitled to a trial by jury on the issue of his guilt or innocence of the charges against him.

In the cause here, the Court of Appeals, in its decision adverse to Appellant (see appendix), recognized the Appellant's right to a jury trial and then ran rough-shod over his rights. The Court said, in headnote 2:

> "The testimony in support of the charge referred to in the first division of the opinion, if not subject to being considered impeached by the jury, demanded a verdict that the respondent was guilty as charged."
> *Clinkscales* v. *State of Georgia*,
> 104 Ga. App. 723.

By the reference, "If not subject to being impeached by the jury", the Court of Appeals undoubtedly recognized the great discretion given a jury in believing or discrediting testimony of a witness. The right of a jury, in crediting or discrediting a witness, is governed by statute, as follows:

> Georgia Code Section 38-107. "*Determination of where preponderance of evidence lies.*—In determining where the preponderance of evidence lies, the jury may consider all the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testified, the nature of the facts to which they testified, and the probability or

improbability of their testimony, their interest or want of interest, and also their personal credibility so far as the same may appear from the trial. The jury may also consider the number of witnesses, though the preponderance is not necessarily with the greater number."

Georgia Code Section 38-1805. "*Credibility of witnesses as question for jury.* The credibility of a witness is a matter to be determined by the jury under proper instructions from the court."

Georgia Code Section 38-1806. "*What credit to impeached witness; question for jury.* When a witness shall be successfully contradicted as to a material matter, his credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his testimony shall be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. The credit to be given his testimony where impeached for general bad character or for contradictory statements out of the court shall be for the jury to determine."

While the above quoted statutes do not themselves control all that a jury may consider in believing or discrediting a witness, we insist that in the cause here, after the Appellant's denial under oath of the accusation against him and his demand for a jury trial, Appellant was entitled to the jury's consideration of the evidence against him, as provided by law.

This principle was followed by the Supreme Court of Wyoming, in a disbarment proceeding, where a statute similar to that in Georgia was under consideration. The Court there held:

"The statute provides that the demand of a jury trial of the facts shall be granted. The intent, so far as it may be gathered from this language, was to give the accused a right of trial of the facts by a jury; not

merely to vest authority in the judge to call a jury at his discretion. It would probably be difficult to escape this conclusion, even if less peremptory words had been used."

State Law Examiners v. *Phelan*, 43 Wyo. 481, 5 P.2d 263.

The Supreme Court of the United States has held that the right to practice a profession is a valuable property right within the meaning of the Constitution. (See *Ex Parte Wall*, 107 U.S. 265, 27 L. Ed. 552, 2 S. Ct. 569). The right of Appellant to practice his profession as an attorney at law is a valuable property right. His admission to practice was regulated by statute. His disbarment from practice of law is regulated by statute. (Georgia Code 9-501 through 9-518.) It necessarily follows that to deprive Appellant of his right to a jury trial, when same is provided by statute, deprives Appellant of a valuable property right without due process of law, in violation of the Constitution of the United States, Amendment XIV, and of the Constitution of the State of Georgia, Article VI, Paragraph VII, Georgia Code 2-3907, and the Constitution of the State of Georgia, Article VI, Section XVI, Paragraph I, Georgia Code 2-5101. (See appendix.) We insist that the statute, Georgia Code 9-513, confers upon the Appellant here an undeniable right to a trial by jury, and to deny him this right deprives him of equal protection of the laws and due process of law, as contemplated by the Constitution of the United States.

This Court, in deciding a similar question, invoking the right of an accused to a jury trial when demanded and provided by statute in contempt cases, brought under the Clayton Act, said:

"Neither is it necessary to consider at length the final contention that the jury provision of the statute

is not mandatory but permissive. It is mandatory. The argument to the contrary is based on the use of the permissive word ('may') 'such trial may be by the court, or, upon the demand of the accused, by a jury.' Strictly and grammatically considered, the word 'may' limits both phrases, 'by the court' and 'by a jury;' but to construe it as contended, in practical effect, would be to subvert the plain intent and good sense of the statute."

Michaelson v. *United States Ex Rel. Chicago, St. Paul, Minneapolis, & Omaha Railway Company*, 266 U.S. 42; 69 L. Ed. (Adv. 14), 45 S. Ct. Rep. 18.

We respectfully insist that the intent of the statute here (Georgia Code 9-513), is apparent; and that the Appellant was entitled to a jury trial. The refusal of the Court to grant the Appellant this right was error, and the subsequent decision of the Court of Appeals of Georgia, affirming said decision, was error.

2

Appended hereto is the testimony of one Vaughn Cannon, a witness appearing against Appellant, and cross-examined by Appellant. This testimony forms the basis for the decision of the Court of Appeals of Georgia in the cause here under review, and is the testimony approved by said Court as proving the allegations for the verdict of guilty and judgment of disbarment of Appellant.

In the Statement of the Case, herein, we have set forth the charge against Appellant insofar as it relates to the witness, Vaughn Cannon.

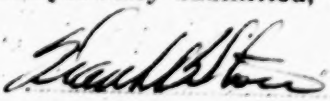
It is apparent, even from a casual reading of the accusation and the testimony that this witness did not substantiate the charge of "bribery" against Appellant. To illustrate our position and rights under the laws of the

State of Georgia and the Constitutional right to due process of law and equal protection of the laws, Appellant insists that he was entitled to have a jury pass upon the testimony of Vaughn Cannon, as provided by law (Georgia Code 38-107, 38-1805, 38-1806, *supra*), and to have the jury consider all the facts and circumstances of the case; this witness' manner of testifying; his means and opportunity for knowing the facts to which he testified; the nature of the facts to which he testified; the probability or improbability of his testimony; his interest or want of interest; and his personal credibility so far as it appeared from the trial. Appellant insists that the credibility of this witness, after cross-examination by Appellant and contradictory improbable statements by him, was for the jury exclusively. To deprive Appellant of this right, granted by statute, deprives him of due process of law and denies him the equal protection of the laws.

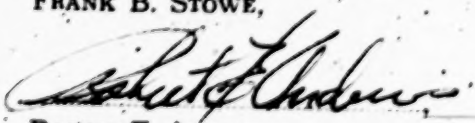
CONCLUSION.

The judgment of the trial Court was error and it should have been reversed by the Court of Appeals of Georgia. For the reasons stated herein, this Court should grant the Writ of Certiorari and reverse the judgment of the Court of Appeals of Georgia.

Respectfully submitted,



FRANK B. STOWE,



ROBERT E. ANDREWS,

Counsel for Appellant.

COURT OF APPEALS OF THE STATE OF GEORGIA

(Case Number 39126)

ATLANTA, October 31, 1961

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

M. B. Clinkscales v. State of Georgia, etc.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA
Clerk's Office, Atlanta.

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Morgan Thomas,
Clerk.

21518

SUPREME COURT OF GEORGIA

ATLANTA, January 4. 1962

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Maylon B. Clinkscales v. The State of Georgia et al.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

BILL OF COSTS, $15.00

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA, JAN. 24, 1962

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Robt. J. Reed paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

K. C. Bleckley,
Clerk.

(Seal)

CASE NO. 39126

COURT OF APPEALS OF GEORGIA

Remittitur from Supreme Court

Filed in office January 25, 1962, Ralph E. Carlisle, Deputy Clerk Court of Appeals of Georgia.

SUPREME COURT OF GEORGIA

Atlanta, January 22, 1962

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Maylon B. Clinkscale v. The State of Georgia et al.

Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF GEORGIA

Clerk's Office, Atlanta, March 28, 1962

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and seal of said court hereto affixed the day and year last above written.

s/ Henry H. Cobb,
Deputy Clerk.

(Seal)

39126. CLINKSCALES v. STATE OF GEORGIA.

Nichols, Judge. 1. The judgment of the Supreme Court in the case of *Gordon* v. *Clinkscales*, 215 Ga. 843, 849 (114 S.E.2d 15), established as the law of the case that grounds of disbarment were stated where it was "alleged that the respondent proposed to a named person to furnish him protection in the operation of a business upon the payment of $10,000.00 in cash and $500.00 per month."

2. The testimony in support of the charge referred to in the first division of the opinion, if not subject to being considered impeached by the jury, demanded a verdict that the respondent was guilty as charged.

3. "It is not improper for the trial court to direct a verdict in favor of disbarment where such a verdict is demanded by the evidence. *Wernimont* v. *State*, 101 Ark. 210 (142 S.W. 194, Ann. Cas. 1913D, 1156)." *Wood* v. *State*, 45 Ga. App. 783, 790 (165 S.E. 908). *James* v. *State*, 73 Ga. App. 834 (6) (38 S.E.2d 125).

4. "Proof that a witness has been convicted of the unlawful sale of intoxicating liquor affords no ground for impeachment of the witness." *Wheeler* v. *State*, 4 Ga. App. 325 (2) (61 S.E. 409). Therefore, evidence that might arouse a suspicion that the witness was so engaged would not tend to impeach his testimony.

5. Assuming but not deciding that a plea of guilty in a tax evasion case would authorize a jury to impeach a witness, evidence that a plea of nolo contendere had been entered by such witness in such a case would not authorize his impeachment. See *Wright* v. *State*, 75 Ga. App. 764 (44 S.E.2d 569), as to the import of a plea of nolo contendere.

6. The evidence given in support of the charge referred to in division 1 of this opinion was not, as con-

tended by the respondent, so improbable as to be unworthy of belief.

7. The evidence demanded the verdict against the respondent on the grounds referred to in the first division of the opinion and the direction of the verdict on such grounds was not error.

8. Inasmuch as the disbarment of the respondent was demanded on the one ground referred to, the other assignments of error made in the writ of error are nugatory and will not be considered.

Judgment affirmed. Carlisle, P. J., and Eberhardt, J., concur. Decided October 11, 1961—Rehearing denied October 31, 1961.

Disbarment. Jackson Superior Court. Before Judge Kennedy from Augusta Circuit.

Robert J. Reed, for plaintiff in error.

John Ackbar Darsey, Davis & Davidson, Jack S. Davidson, H. W. Davis, contra.

This is the second appearance of this case in this court. On the first appearance this court was equally divided on the question of whether a disbarment proceeding could be brought against the respondent while he was serving as judge of the Superior Court and the writ of error was therefore transferred to the Supreme Court. The Supreme Court held (*Gordon* v. *Clinkscales*, 215 Ga. 843, 849, 114 S.E.2d 15), that such action would lie and that, without passing on all the grounds presented, two of the alleged grounds of disbarment were sufficient to authorize the disbarment of the respondent and were not subject to demurrer. After the judgment of the Supreme Court was made the judgment of the trial court various grounds of demurrer were filed and ruled on, and there-

after, the case was tried. On the trial of the case, at the conclusion of the plaintiff's evidence and after both sides had closed, the trial court directed a verdict of guilty on specified grounds and of not guilty as to others, and entered a judgment disbarring the respondent. Thereafter, the respondent's motion for a judgment non obstante veredicto and for a new trial were overruled and he now assigns error on the judgments adverse to him.

Constitution of State of Georgia, Article VI, Section IV, Paragraph VII, Georgia Code 2-3907:

> "*Judgment of the court.*—The Court shall render judgment without the verdict of a jury in all civil cases, except actions ex delicto, where no issuable defense is filed except as otherwise provided in this Constitution, and subject to the right of trial by a jury on written demand of either party."

Constitution of State of Georgia, Article VI, Section XVI, Paragraph I, Georgia Code 2-5101:

> "*Right of trial by jury.*—The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the Superior Court."

Constitution of United States, Article XIV, Section 1:

> "*Citizenship.* (Section 1.) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Testimony of Vaughn Cannon.

VAUGHN CANNON was called as a witness by and on behalf of the Relators and, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. Daris.

Q. Please give the Court your name and address, please, sir.

A. Vaughn Cannon, Asheville, North Carolina.

Q. All right, Mr. Vaughn Cannon, I'll ask you if you were residing in, at the time, in Commerce, Georgia, about the early part of 1958?

A. Yes, sir.

Q. I'll ask you if you owned or represented a corporation that owned or had some connection with a corporation that owned a hotel?

A. My wife—previous wife that I'm divorced from—settlement—received a sum of money and it was invested in bonds at a very low income and she had asked me repeatedly to try to find her—

By Mr. Daris:

Q. Just go ahead and tell them about your connection with the Andrew Jackson Hotel.

A. I'm sorry, sir.

Q. Were you in Commerce the early part of '58?

The Witness: I was in Commerce at that time.

By Mr. Daris:

Q. I'll ask you if in your connection with the Andrew Jackson Hotel to state to the Court and Jury what you attempted to do.

A. Well, I saw a piece of property that had sold several times and had several managements and each man had gone broke—

Q. Don't go into that, just say what you expected to do.

The Court: Don't go into all that, Mr. Cannon. The question is in connection with the hotel, what did you attempt to do?

The Witness: I expected to make it a profitable business.

By Mr. Davis:

Q. All right, I'll ask you if you attempted or started attempting to organize a club, an Elks Club or a Moose Club in Commerce, Georgia?

A. Yes, but will I have the chance to explain the conditions that brought this up, why I did?

The Court: Well, go ahead.

The Witness: First—

The Court: Ask him another question.

By Mr. Davis:

Q. All right. What did you do, Mr. Vaughn Cannon, with reference to attempting to set up or get a club organized?

A. I'm trying to cooperate with the Court, your Honor, this is the second time I've been on the witness stand.

Q. Just state whether or not you contacted people with reference to this matter, Mr. Vaughn Cannon.

A. Yes, sir.

Q. All right. How long a period of time did you contact people or talk with people in and around Commerce with reference to organizing a club?

A. Several months.

Q. I'll ask if you first attempted or did attempt to get an Elks Club charter in the city of Commerce?

A. Yes, sir.

Q. I'll ask you whether or not you succeeded in getting one—an Elks Club charter?

A. No, sir.

Q. I'll ask you if you went to the people who handled those things to ascertain why you didn't get a club?

A. Yes, sir.

Q. Did you learn—

A. Let me correct one thing. I didn't go to those particular people, but I went to a man who was associated with the Elks Club.—I've been an Elk myself for fifteen years—in Athens, Georgia. Of course, that was after the charter was turned down, after all the members had joined and paid in their fees, their dues. And this particular man in Athens, Georgia, told me—

Mr. Davis: Just state if you learned you couldn't get a charter.

The Witness: Couldn't get a charter.

By Mr. Davis:

Q. All right. Did you then undertake to organize or set up a Moose Club in Commerce?

A. Yes, sir.

Q. Now you said while ago about the members, the people that had paid their dues and joined and so forth, was that local people?

A. Yes, sir.

Q. I'll ask you if, during the progress of attempting to set up a Moose Club in Commerce, Georgia, you got information or had information that there might be somebody attempting to block that?

A. Well—

The Court: Where did he get his information?

Mr. Davis: All right, tell him.

The Witness: The Elks Club or the Moose Club's charter?

Mr. Davis: How's that?

The Witness: Are you talking about the Moose Club or the Elk's charter?

By Mr. Davis:

Q. The Moose Club—that was the last one you organized or attempted to organize, was it not?

A. Well, it was different people. For instance, one was Mr. Mose Gordon, Mr. Veal. I think Mr. Claude Hirsch, any number of citizens in Commerce.

Q. All right, now was that the Elks Club?

A. That is the Moose Club.

Q. The Moose Club? All right. I'm asking you how if you learned that there was some effort being made to prevent your organization of that Moose Club?

A. Yes, sir, terrific effort.

Q. Did you learn who it was?

A. Yes, sir.

Mr. Smith: If Your Honor please, if he's going to state that he learned certain things I think he should be required to say from whom he learned it.

The Court: Well, ask him that. Who'd you learn it from?

The Witness: Mr. Clinkscales made this statement in the presence of two dozen citizens. I'll name one of the citizens, which I can't call his name now, but he was elected for the State Representative from Jackson County this last term. His name is Mr. Harden or Mr. Hardeman. He had told me that Maylon had made the statement in the crowd that the Moose Club would never open.

By Mr. Davis:

Q. All right. Do you know whether or not Jackson County is a dry county?

A. Yes, sir.

Q. Would the organization of this club contemplate a bar for its members?

A. To serve the members set-ups for their drinks.

Q. All right. After you learned the information you have stated from Mr. Harden I'll ask you to state if you went to see Judge Maylon Clinkscales?

A. No, sir, not at that particular time. I went to see Mr. Clinkscales after the Elks Charter was refused, turned down.

Q. Well, which charter came first, Mr. Cannon?

A. The Elks Charter. The purpose was to set it up —the place to be set up as an Elks Club.

Q. Well, did you get the information about—that you've just related about—while you were organizing or attempting to organize an Elks Club?

A. Yes, sir.

Q. All right. Based on the information that you say you got, did you go with your brother-in-law to see Judge Clinkscales?

A. Yes, sir.

Q. All right. I'll ask you to state the conversation as near as you can recall that took place while you and your brother-in-law was in Judge Clinkscale's office.

A. Well, first, I didn't know Judge Clinkscales personally, only from reputation, hearsay. I asked my brother-in-law, which he knew him very personally—

Mr. Smith: If Your Honor, please, that's not responsive to the question he was asked. He was asked to state what the conversation in Judge Clinkscales' office was.

The Witness: Well, we walked in the office, my brother-in-law introduced me to Clinkscales, and I asked him why did he block the Elks Charter. I said, "You organized the Elks Club in Gainesville and you're a member in Athens, and I'm a brother in the Elks," and I said, "Just why did you block this charter?" His answer was that due to the bootleggers and the preachers and the upset and the confusion at this particular time he didn't think it was advisable to open an Elks Club.

By Mr. Davis:

Q. Well, all right.

A. Well, I said, "Judge, there's a lot of money invested over there, it's a losing proposition, and it's impossible to wait six or twelve months to organize the

Club." I said, "The only alternative I've got is to turn around and attempt to organize us a Moose Club."

Q. All right, go ahead, what did he say?

A. Well, I asked him a few more questions. I said, "Judge, in your opinion, is it illegal in a dry county for a man to have a locker with his own key and his own name on a bottle of whiskey to be served across a bar with a set-up?" Judge Clinkscales said, "Definitely it's in violation of the law of the State of Georgia." That was in the face of legal advice from several attorneys that advised me to the contrary.

Q. All right. How did that—wait just a minute—just state to the Court and Jury, Mr. Vaughn Cannon, how that conference ended.

A. How it ended?

Q. Yes, sir.

Mr. Smith: Your Honor, please, if he's going to tell it I think the witness ought to go ahead and tell the whole thing.

The Court: What happened next, Mr. Cannon? Come on and let's don't kill so much time with it. Tell all the conversation with Judge Clinkscales.

The Witness: Well, that's about the gist of the conversation except for a little petty talk. At the time, during the conversation Maylon had made a remark that "you wear mighty fine clothes." I have a watch here that's a diamond watch that might have cost seven or eight hundred or a thousand dollars—it's a diamond watch—he remarked, said "I'd like to have me a watch like that!" And this watch was given to me from some source. So at the time that we were sitting there—we were standing, rather, talking—my brother-in-law walks out of the Clinkscales office. Judge Clinkscales said, "You come back to see me:" and said, "You and I shouldn't have any trouble to get along."

By Mr. Davis:

Q. Did he suggest you come back by yourself?

A. No, sir.

Q. He just told you to come back to see him?

A. (No response.)

Q. In response to that request, did you later go back?

A. Yes, sir.

Q. Did your brother-in-law or anybody go with you?

A. No, sir.

Q. All right, just tell the Court—

The Court: Speak louder so the Jury can hear you.

By Mr. Davis:

Q. Just tell the Court and Jury what happened, the conversation that took place in that conference.

A. Judge Clinkscales told me that, he says, "The boys want to run me for governor," and he says, "This place over here, this club that you're trying to set up, has got to help carry the load." I said, "Well, Judge, what do you propose? What does it take?" He said, "Well, to start with it takes ten thousand dollars in cash and it takes five hundred dollars a month for you to do business here in this town." And I tried to reason with him and he snapping his finger, he got me out of his office. He said, "You think it over and come back and see me."

Q. All right, what did you state to him after he told you that, if anything?

A. I told him that this was purely a fraternal organization; that the proceeds of the income, which he warned me, went for charity; that there was no possible way for me to make that kind of money, to pay him that kind of money and survive in that business.

Q. And then he told you—

A. He said, "I'm the whopping (sic) boss." That's the word he used.

Q. Whipping boss?

A. The "Whopping" boss. He said, "Take the county and do whatever you're big enough to do."

Q. And then he told you to think it over and come back?

A. (Nods affirmative.)

Q. And you left?

A. (Nods affirmative.)

By Mr. Davis:

Q. I'm sorry. Mr. Vaughn Cannon. I'll ask you if anything happened at the hotel and the club on Friday night or Saturday night before the August term of court, 1950, ah—All right, let me go back just a little, Mr. Vaughn Cannon. I'll ask you if after you left Judge Maylon Clinkscales' office if you continued your efforts to organize the Moose Club?

A. Several times.

Q. Several times?

A. I only went back after I heard that Clinkscales was giving the underground that it wouldn't open.

Q. Went back, now you're talking about the conference you had already had with him?

A. Let me get back at the conversation. When I said Moose Club he didn't have anything to say. I said, "Judge, I don't want to embarrass you, I didn't come here to violate the laws of Georgia. These fraternal organizations are accepted and I hate to go against your wishes but, if it's humanly possible, I'm going to organize a Moose Club."

Q. All right. And you did continue your efforts to organize a Moose Club?

A. Yes, sir, I rode right over his threats and done it.

Q. All right. What happened when you done that?

A. Let's see if I understand your question.

Q. You say you continued to try to organize the Moose Club?

A. I ran into opposition from every corner. I left Florida.—I had business in Florida—I left Florida and personally came up here to see that there wasn't one man going to run me out of this town and cause me to lose my investment.

Q. All right. You did continue your efforts to organize the Moose Club after your conference with Judge Clinkscales?

A. Yes, sir.

Q. Did you ever go back to his office?

A. Yes, sir.

Q. What happened at that conference?

A. Well, naturally, I didn't go back until I had heard these rumors.

The Court: Well, what happened when you got there, Mr. Vaughn? Don't dilly-dally so much.

The Witness: I said, "Maylon," I said, "What do you think about this club?" He said, "Well, what are you worrying about? Vaughn, you're rolling, aren't you?"

By Mr. Davis:

Q. All right, go ahead and state what happened.

A. That's about all. And he give me this out of the office (indicating with his hand).

Q. All right, what next happened?

A. The next time I went to see him he was in a rage. He says, "Cannon, I'm going to raid your hotel, every room in it, every day for thirty days." I tried to reason with him. I said, "There's nothing over there except the Moose Club." He said, "You better get them out of there too."

Q. All right, what next happened? How did that conference wind up?

A. He said—I tried to push the conversation—he said, "If you've got anything further to say, you go talk to Marvin or Melvin Pierce."

Q. Marvin Pierce?

A. Yes.

Q. He suggested you go to see Marvin Pierce? Did you go to see Marvin Pierce?

A. Yes, sir.

Q. What happened there?

A. I went to see Marvin Pierce some time later. I laid on his desk a list of the citizens that was backing this club, including the officers. I said, "Marvin, I talked to some of the officers. I said, 'Everybody needs representation due to the circumstances and the situation. I want to suggest to you that you send me to Marvin Pierce to see if I can't work out some kind of a deal for him to represent this club.'"

Q. Well, you suggested to Marvin that you wanted to send some of the members to see him to represent the Club?

A. I suggested to the officers of the Club that I go see Marvin. I didn't tell any of the officers any of this conversation between Maylon and I because I wanted this piece of property to survive if it was possible.

Q. All right. What happened in Mr. Pierce's office?

A. I laid the list of names on his desk, which consisted of a hundred of the best citizens of Commerce, including the officers. I said, "Marvin, for God's sake"—pardon the expression—I said, "Try your best to talk reason to Maylon Clinkscales because he's going to come over there and tear my place apart." Marvin said, "I'll go see him and see what I can do." He said, "Come back to see me later."

Q. All right, what happened next?

A. I went back to see him later.

Q Marvin?

A. (Nods affirmative.)

Q What happened then?

A. He gave me a little phony, short conversation, said Maylon don't think much about that thing over there.

Q. He didn't think much about it? You didn't employ him?

A. (Shakes head negative.)

Q. Now, all right, what next happened?

A. The next that happened was the raid.

Q. Well, all right, when was the raid?

(Pause)

A. It was on a Friday night before the first of August, 1958.

Q. Before the first of August, you mean the first Monday in August?

A. The first Monday in August.

Q. All right, just state what happened at the raid.

A. They covered the place up with at least twenty-five officers. They run roughshod all over my property illegally without warrants. Tried to get in the rooms. Got in some of the rooms. They went into the—some of the storage compartments and into the kitchen, behind the desk. The man that was heading the raid said, "I'm in charge. You property owners got nothing to do with this."

Q. Who was that? Did you know him?

A. Warmack.

Q. Warmack?

A. Finally, when they got down to raid—I said, "I'm representing this property." I said, "Show me a warrant. The rest of the places they had asked for a warrant." He said, "I don't have to have a warrant." He said, "I'm law and order here." So they got to the Club. I said, "Gentlemen, this is my property and I represent this property, represent the owner of this property." I said, "Show me a warrant." So I got the same

answer—"Don't need a warrant"—so I said, "You'll have to bust in."

Q. Well, was you arrested that night?

A. Yes, sir.

Q. Were the other people arrested there at the hotel that night?

A. Yes, sir. One other point I wanted to make. No, I was the only one that was arrested.

Q. All right.

A. There's one other point I'd like to bring out about the raid.

Q. All right.

A. Finally he got in the Club room, went around the back door was the way to get in the Club room; and I said, "I demand a warrant." I said, "There's twenty-five witnesses here watching you and they're going to testify in court against you and I demand that you show me a warrant. I've got a legal right to see a warrant." He pulled a warrant out, I began to read it. He snatched it out of my hand and I held on to two corners of it. He kicked me on the shin, he grabbed my thumb and bent it back, and I went to, I believe, it's Scoggins or one of the men there. He kicked me on both shins, turned around to the man and said, "Throw the handcuffs on him. I'm going to charge him with resisting arrest." I said, "Be sure you know what you're charging me with because these witnesses are going to testify in court." A man got excited and they was all carrying pistols, I was only asking the right thing as I saw it, and I figured that they wasn't too good to shoot me.

Q. All right, was you carried to jail that night?

A. Yes, sir.

Q. Was there others in connection with it carried to jail?

A. No, sir.

Q. Were you permitted to make a bond?

A. The warrant read, "Take to jail—"

Mr. Smith: Your Honor, please, that's not the question he was asked. Why can't he answer the question?

The Court: Answer the question, Mr. Cannon.

The Witness: No, sir, I didn't make bond.

Mr. Davis:

Q. All right. That was Friday night; how did you gain your release?

A. Through a special hearing, a habeas corpus through Judge Early Starke's court.

Q. On the following day?

A. Yes, sir.

Q. And you was released on Saturday following?

A. That's true.

Q. You haven't had any conversation with Judge Clinkscales since that time?

A. No, sir.

Q. All right.

Cross-Examination by Mr. Smith.

Q. Mr. Cannon, you testified, I believe, that you live in Asheville, North Carolina?

A. (Nods affirmative.)

Q. Whereabouts?

A. Where do I live? Sixty Biltmore Avenue.

Q. Sixty Biltmore Avenue, Athens, North Carolina?

A. Asheville, North Carolina.

Q. I mean Asheville, North Carolina. Do you live any other place besides there?

A. East Tennessee.

Q. Whereabouts in East Tennessee?

A. Johnson City.

Q. Do you have an address in Johnson City?

A. My wife, I'm really there on weekends. I call my residence Asheville.

Q. Does it have an address, sir?

A. Kingsport Highway.

Q. There's no number or anything?

A. Route 7.

Q. Route 7, no number of anything on it?

A. Yes, sir.

Q. I understand your testimony is that there is no street number on there?

A. That's right.

Q. You're under oath, you realize that?

A. Yes, sir.

Q. And now, sir, you testified that you came down here and undertook to organize an Elks Club, is that correct?

A. That's right.

Q. And that you found out from some man in Athens that you couldn't?

A. Yes, sir.

Q. Who was that man?

A. Mr. Rosenthal, who is the head of the State of Georgia.

Q. Mr. who Rosenthal, sir?

A. He owns a shoe store there. He's well known; he's head of the Moose in the State of Georgia. I don't know his first name.

Q. You don't know his first name but he owns the Rosenthal Shoe Store in Athens?

A. Yes, sir.

Q. Now when did you talk to him?

A. Immediately after the Elks Charter was turned down, I don't know, probably about '47, sometime in '47.

Q. And he told you why it was turned down?

A. To start with, he said, "I'd rather not discuss it."

Q. Did he tell you why it was turned down?

A. In the end he did.

Q. All right, why did he tell you?

A. Because I was a brother Elk and I was entitled to know.

Q. I mean, what reason did he give for your charter being turned down?

A. He said it didn't fit in with Judge Clinkscales' politics right here at this particular time.

Q. And that was because of the sale of alcoholic beverages, wasn't it?

A. No, sir.

Q. That wasn't mentioned when you talked to Mr. Rosenthal?

A. No, sir.

Q. And you state under oath that that's true?

A. Yes, sir; I do.

Q. Now you testified that you came down here, you didn't want to violate any laws, is that right?

A. That's completely right.

Q. Now, at this room at the Hotel over there, it was proposed that alcoholic beverages would be consumed in that place, was it not?

A. I built a set of lockers—

Q. Just a moment. You make your explanations—

The Court. Just answer the question.

By Mr. Smith:

Q. Just answer my question first. It was intended to consume alcoholic beverages in that place, was it not?

A. Consume 'em, yes, sir, not to sell 'em.

Q. Now how was it going to get in that place?

A. Each individual member brings his own alcohol.

Q. Now how many individuals—

A. Judge, if Your Honor please—

The Court. Well, just answer the question.

The Witness. But he's asking me questions that officers of the Club—

The Court: Just answer the questions. Go ahead. What was the question?

Mr. Smith: I asked how you proposed to get the whiskey in there?

The Court: Answer that.

The Witness: That was up to the officers of the Club.

The Court: All right.

By Mr. Smith:

Q. Now I'll ask you, sir, did you propose in that place—that is, in the Andrew Jackson Hotel, Inc., in Commerce, Jackson County, Georgia—which is, as you know, a dry county, had you established in the basement of that Club—of that Hotel—a club headquarters?

A. (Nods affirmative.)

Q. You had?

A. Yes, sir.

Q. And that, in that club headquarters, was there located a bar for the sale and dispensation of alcoholic beverages?

A. I only set the club up for the purpose of an Elks Club.

Q. My question is, and I repeat,—

A. Personally, I did not.

Q. In that club headquarters, was there located a bar for the sale and dispensatio of alcoholic beverages?

A. In that club room was a bar, but I wouldn't say it was for the sale of alcoholic beverages.

Q. Would you say it was for the sale—

A. It was completely operated and run by, which the Hotel Incorporation gave the lease to the members, and what their policy was, I'm not sure about that.

Q. You had a written lease covering that?

A. Yes, sir.

Q. Well, now was it a bar for the sale and dispensation of alcoholic beverages?

A. Not for the sale.

Q. Now, were there located in there also slot machines?

A. I have seen slot machines.

Q. Well, were they located in there?

A. Yes, at one particular time, a couple of particular times.

Q. You know slot machines are against the law?

A. There's a question about that, in my opinion. They've got 'em in the Commerce Veterans Club for ten or twelve years; they've got 'em over here in Maylon Clinkscales district in—right out of Winder. They've been there for ten or fifteen years, so if they're a violation of the law, why isn't something done about it?

Q. You'll have to take that up with the proper law enforcement agency, Mr. Cannon.

A. Well, I don't know, maybe you should take it up.

The Court: Now, wait a minute, Mr. Witness. You respond to the questions and let's don't have any argument.

The Witness: Yes, sir.

By Mr. Smith:

Q. Now who do those slot machines belong to?

A. I don't know.

Q. They just showed up there?

A. I don't know.

Q. You were a member of the Club?

A. Yes, sir.

Q. And you also were in charge of the overall property? I believe you testified you were the agent for the property?

A. The property was leased.

Q. You testified you were the agent for it, didn't you?

A. I was agent for the property owner, not for the operators of the property.

Q. Well, you were not agent for the operators of the property?

A. No, sir.

Q. And the owner had parted with possession to the property and leased it to some operators?

A. I beg your pardon?

Q. The owners were not operating the property, were they?

A. No, sir.

Q. And you were agent solely for the owner?

A. (Nods affirmative.)

Q. Well, why were you demanding a warrant? You said you were agent for who?

A. I didn't want the property owner—

Q. The property owner wasn't there, was it?

A. I didn't want them to be put out of business and improperly abused.

Q. But the property owner wasn't operating the business.

A. I was representing the property owner.

Q. But they were not operating it, were they?

A. They owned the property; it was abuse of the property.

Q. You're not the owner's and operators' agent, though?

A. Not the operators' agent but the owner's agent.

Q. Now you say then, that as the agent for the owner and a member of the Club, you have no idea how those slot machines got there?

A. No, sir.

Q. You don't know.

A. I wasn't an officer.

Q. You don't know who put the nickels in them?

A. No, sir.

Q. You don't even know if there were any nickels in them, do you?

A. Yeah, I'd say so. I played 'em some myself.

Q. Now I believe that you testified that this was the second time in your life you'd ever been on a witness stand, is that correct?

A. To the best of my knowledge I think so.

Q. Were you ever on the witness stand in Asheville, North Carolina?

A. Yes, sir.

Q. How many times?

A. To my knowledge, once.

Q. Ever on the witness stand in Greensboro, North Carolina?

A. No, sir.

Q. You were not on the witness stand in Greensboro, North Carolina, in the year 1951?

A. No, sir.

Q. Now, you are very familiar with slot machines, aren't you?

A. Yes, sir.

Q. You've already tangled with the law on that subject, haven't you?

A. Twenty years ago.

Q. Twenty-one years ago, wasn't it?

A. Yes, sir, that may be right; I'm not saying exactly. It could be eighteen years ago.

Q. Now was there any gambling other than slot machines going on over there?

A. In where?

Q. In the Moose Club?

A. No, sir, not to my knowledge.

Q. I show you a picture and ask you if you happen to recognize it (presenting)?

A. Yes, sir, that was put there for the members.

Q. I ask you if you recognize the picture?

A. I recognize it.

Q. Now is that a picture of a poker table?

A. Yes, sir.

Q. With some bottles and glasses around it?

A. Let me see it again. I'll have to get my specs out. (Pause.) Well, I see a bottle there, what I'd call a 7-Up.

Q. Do you see some glasses?

A. Oh, yeah, I see about ten cases of beer. Right in this corner I see two—I can't make them out, they could be glasses.

Q. Now those ten cases of beer, were they brought there by the various members?

A. That's something that I'm not familiar with. The officers of the Club—

Q. You just don't know?

A. I wasn't an officer.

Q. You were organizing it; you were going out soliciting members, doing your best to get the Club going, but when it comes down to the beer and the slot machines you don't know how they got there?

A. I was trying to take a sick piece of property—

Q. Is that correct?

A. And make it—

Q. *Mr. Smith:* You testified, I believe, on direct examination that you were trying to organize this club, that you were doing all of this in order to get a club in there, and yet you now testify that, notwithstanding that, you have no knowledge of how beer or slot machines got there, is that correct?

The Witness: Not in the beginning, anyway.

The Court: Now, wait a minute, answer his question yes or no and then make any explanation—

The Witness: Excuse me.

By Mr. Smith:

Q. Do you testify now—

A. I did make the statement that I had nothing to do with the operation of the Club and I'd like to explain it if I may. In the beginning the president of the corporation which the property was leased to was very weak with money and they needed help and it looked like it was going to fold up and the pressure Clinkscales was putting on them. I came in personally and tried to give 'em a hand to get this piece of property producing revenue and making a reasonable return on their money, the people which I was interested in representing.

Q. On the night of this raid—

A. He asked me a question and if I hadn't a gone in and explained it it would have put me—

Q. On the night of the raid you were present, were you not?

A. I had been out of town and I had just arrived there. I was the :: yes, sir, excuse me, I was there.

By Mr. Smith:

Q. On the night that you have testified that this raid was conducted, you were present, is that correct?

A. Yes, sir.

Q. There were also present a number of cases of beer, is that correct?

A. Explain that again.

Q. There were also on the premises used as this Club a number of cases of beer?

A. Of beer, yes.

Q. Of beer.

A. Yes.

Q. And now, sir, did you have directly or indirectly anything to do with bringing that beer into Jackson County?

A. No, sir.

Q. You so swear under oath?

A. That's right.

Q. Now, sir, was there not also whiskey at that Club at the time it was raided?

A. Yes.

Q. Do you now swear that the only whiskey that was there was the individual bottles brought in by each individual members?

A. To my knowledge.

Q. Now, the beer that was there, how was that beer dispensed?

A. That—I don't have information to cover that.

Q. Mr. Cannon, don't you know it was sold over the bar there and kept cold?

A. No, sir.

Q. Are you swearing, Mr. Cannon, that you have never seen that happen there?

A. No, sir.

Q. You mean you're not swearing that or you are swearing that?

A. I am swearing that.

Q. All right, Mr. Cannon, let me ask you something else. You testified that you had a conversation with Judge Clinkscales in which you asked him his opinion as to the legality of consuming alcoholic beverages in a dry county under a bottle club type arrangement, is that correct?

A. Where individual owners own their own bottle.

Q. And you told him—and he told you that in his opinion that was a violation of the law, did he not?

A. Yes, sir.

Q. Now you swore on direct examination that you had had legal advice from several lawyers that that was not true. Name those lawyers.

A. Well, the one that was paid was Attorney Brown, Mr. Rupert Brown, who showed me a brief on it.

Q. Mr. Rupert Brown of Athens, Georgia?

A. Yes, sir.

Q. Who were the others?

A. The others were obtained at random, weren't paid, I asked their opinion.—

Q. Well, who were they?

A. Maybe Mr. Davis was one, Mr. Early Stark was one, I couldn't be sure about this, but possibly John Darsey.

Q. Now was—the Hotel, I believe you testified, was not making any money?

A. No, sir.

Q. And that it was for that purpose that you wanted to get the Elks Club in there?

A. Yes, sir, that was the answer.

Q. Now will you explain to this Jury how the Elks Club, for members only, would help your Hotel?

A. There's a lot of traveling men on the road; the majority of them are Elks. After a hard day's work they want a drink of whiskey; they want it under a pleasant atmosphere; that was the purpose.

Q. And now, sir, will you tell this Jury where those traveling men were going to get their whiskey?

A. There's several legal places in Georgia. Most any man—I'm trying to do right, Judge—most any man doesn't like to drink alone; he likes a pleasant atmosphere; he likes company. Most any man can buy a bottle of liquor and put it in his locker and take his key and serve it and get service, which consists of ice, mixed drink, or however type he likes his drink, which was quite, to my thinking, was quite an incentive for the Club.

Q. Now, I take it your testimony is that the traveling men who happened to stop at the Hotel would drink the whiskey belonging to the members?

A. Their own whiskey.

Q. They were going to bring it with them?

A. Yes, sir.

Q. And for the purpose of having a place for the traveling men to take a drink?

A. That was my thought. I had no control of that, only the officers of the Club set the policy.

Q. And if the traveling men happened to want a bottle of beer they'd bring a case of beer with them?

A. That was my thought after Clinkscales, what he had said.

Q. And it undoubtedly was traveling men that brought all this beer that was in this picture. I imagine, wasn't it?

A. That was the officers' policy. I don't know anything about that.

Q. Who was the bartender at that Club?

A. John Seamore.

Q. And his job was just to have set-ups available, is that correct?

A. I don't have that information. Now I didn't have anything to do with the operation of the Club.

Q. You were a member.

A. But, spasmodically, once a month or twice a month or however often I was up from Florida I was in the Club.

Q. Now where do you live when you are in Florida?

A. Miami.

Q. Where in Miami?

A. 4007 University Drive.

Q. Four double o seven University Drive. Now, sir, is that a permanent abode of yours?

A. My sister owned the home; I lived there for six or seven years.

Q. Do you still live there?

A. No, sir.

Q. You just live in Asheville and Tennessee now?

A. Asheville is my residence.

Q. Did you come here from Asheville or Miami?

A. Miami.

Q. When were you last in Asheville?

A. Within three or four days.

Q. You went from Asheville to Miami and then back up here?

A. No. I went from Asheville to Atlanta and back up here.

Q. Well, you said you came from Miami.

A. I came from Miami about a year and a half or two years ago.

Q. Now I'll ask you whether or not in 1950 you were in a case, in 1951, you were in a case in Greensboro, North Carolina?

A. Income tax evasion, and I pleaded *nolo contendere*. Now I don't know whether this is out of order, Judge, but the same as you was—you pleaded *nolo contendere*. Is that all right, Judge?

Q. You're quite right, sir. Two years—

A. No, sir.

The Court: What was the question, Mr. Smith?

By Mr. Smith:

Q. I asked him if he was in a case in Greensboro, North Carolina, in 1951. You did not testify in that case?

The Court: He said "yes".

By Mr. Smith:

Q. You didn't testify in that case?

A. No, sir.

Q. Mr. Cannon, at the present time what business are you in?

A. Real estate business.

Q. Real estate business in Asheville, North Carolina?

A. And Tennessee.

Q. And Tennessee? And you no longer have a business in Florida?

A. No, sir.

Q. What business were you in in Florida?

A. Real estate business.

Q. Was that the business you were in when you came to Jackson County?

A. Yes, sir.

Q. And I believe you testified that you were only acting as agent for the owners of that property there.

A. Which was my former wife, yes, sir.

CERTIFICATE OF SERVICE.

I, ROBERT E. ANDREWS, of counsel for Maylon B. Clinkscales, Appellant named herein, do hereby certify that true copies of the foregoing Petition for Writ of Certiorari of Maylon B. Clinkscales were this date deposited in the United States Post Office, Gainesville, Georgia, with adequate postage, addressed as follows: Honorable John Ackbar Darsey, Attorney at Law, Commerce, Georgia, and Honorable Jack S. Davidson, Attorney at Law, Jefferson, Georgia; that the above-named attorneys are of counsel for the Appellee named herein.

This 13th day of April, 1962.

Robert E. Andrews

ROBERT E. ANDREWS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 878.

MAYLON B. CLINKSCALES,
Appellant,

vs.

THE STATE OF GEORGIA,
Appellee.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia.

BRIEF FOR APPELLEE IN OPPOSITION.

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OPINION BELOW.

The opinion of the Court of Appeals of Georgia is reported at 104 Ga. App. 723, and is correctly quoted in the Appendix to the Petition.

JURISDICTION.

The jurisdictional statement as made in the Petition is wholly deficient and inadequate to invoke the jurisdiction of this Court, and, as appears in the argument herein, the authorities there cited are irrelevant and inapplicable.

QUESTIONS PRESENTED.

Contrary to Appellant's statement of the "Questions Presented," the petition does no more and no less than to pose the queries:

1.

Where, in disbarment proceedings, the Respondent, upon timely demand, is granted a trial by a jury, a jury is impaneled, the evidence in support of the charges is concluded, the Respondent elects neither to take the stand in defense of his own character which has been placed in issue, nor to introduce the testimony of any one of his named co-conspirators, and rests his case without the introduction of any evidence of any kind or nature, does the 14th Amendment to the United States Constitution guarantee to the Respondent the right to a verdict at the hands of the jury rather than upon the direction of the court, when such directed verdict is demanded, and represents the only one which would be authorized by the evidence?

2.

Assuming so, in the circumstances where neither any state nor any federal constitutional question in respect thereof was raised in either the trial or the state review courts, and where no determination of any such state or federal constitutional question has been made by any one of such courts, may the jurisdiction of this Honorable Court be invoked through a petition which raises such issue for the first time?

STATUTES INVOLVED.

The Petition fails to set forth the controlling statute codified as Ga. Code Ann., Section 110-104, which provides:

> "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions of inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto."

ARGUMENT

Respectfully suggesting that to each of the queries hereinabove stated a negative answer is required, we submit, argument thereupon *seriatim*.

I.

There has been no denial to Appellant of any right to a trial by a jury. Appellant elected to default in the formulation of any issue of fact for the jury to try.

Contrary to the implications of Appellant's argument, this is not a criminal or quasi-criminal proceeding; nor is it criminal in nature. Such an innuendo is in the teeth of the law of the case as established by the Supreme Court of Georgia in **Gordon v. Clinkscales**, 215 Ga. 843 (114 S. E. 2d 15). See also **City of Atlanta v. Stallings**, 198 Ga. 510 (32 S. E. 2d 256), where such proceedings are denominated civil in character.

Appellant has neglected to call to the attention of the court the basic authority for the direction of verdicts in civil matters as embodied in **Ga. Code Ann.**, Section 110-104, which provides as follows:

> "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions of inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto."

This section has so often been held not to be repugnant to the Constitution of this State or that of the United States, as impairing the right of trial by jury, or as depriving a party of due process of law, as not to be in dispute. **Tilly v. Cox**, 119 Ga. 867 (2) (47 S. E. 219); **Price v. Central of Ga. Ry. Co.**, 124 Ga. 899 (2) (53 S. E. 455); **Lynch v. Southern Express Co.**, 146 Ga. 68 (3) (90 S. E. 527).

Under our procedure,

> "It is the province of the jury, in civil cases, to pass upon questions of fact, and a trial by jury in such cases presupposes an issue of fact; so if there be no such issue, there is nothing for a jury to pass on. The jury, in such cases, has nothing to do with questions of law that may be involved, or with inferences of law from undisputed facts. A plaintiff might with as much reason contend that the court when granting a nonsuit deprived him of his right of trial by jury as . . . (Appellant contends) that he was deprived of such right by the direction of a verdict against him . . . ." **Tilly v. Cox**, supra, 119 Ga. 867, 871.

And, of course, the

> "Contentions of a party in pleadings, unsupported by evidence, are insufficient to make an issue for consideration by the jury." **Walton v. Johnson**, 213 Ga. 109 (1) (97 S. E. 310).

An almost identical parallel obtains in federal civil practice wherein authority for the direction of verdicts is found in **Rule 50, Federal Rules of Civil Procedure.** Under this Rule and prior law it has been consistently held that the trial court should grant a directed verdict when the evidence is such that there are no controverted issues of fact upon which reasonable men could differ, and neither summary judgment nor the direction of a verdict infringe the right of jury trial preserved by U. S. C. A., Const. Amendment 7, where the question is one of law. **Whitsell v. Alexander**, C. A. Ill. 1956, 229 F. 2d 47, Certiorari denied 76 S. Ct. 788, 351 U. S. 932, 100 L. Ed. 1491; **McIlvaine Patent Corporation v. Walgreen Co.**, C. C. A. Ill. 1943, 138 F. 2d 177.

It is equally clear that the 14th Amendment to the Federal Constitution does not guarantee to the accused

any right to a verdict at the hands of a jury in such cases. **Walker v. Sauvinet**, 92 U. S. 90, 23 L. Ed. 678.

On the basis of the foregoing authorities, we respectfully submit that Appellant has not been deprived of any right guaranteed to him by either the State or Federal Constitutions, and that a negative answer is in order to the query first above stated.

2.

Contrary to Appellant's jurisdictional statement, the decision *sub judice* is wholly consistent with the applicable laws of the State of Georgia. It does not represent any departure from the accepted and usual course of judicial proceedings which would afford any basis for the exercise of this Court's power of supervision.

The accepted and usual course in such cases was announced in the case of **Wood v. State**, 45 Ga. App. 783 (165 S. E. 908), wherein at page 790 the court stated:

> "It is not improper for the trial court to direct a verdict in favor of disbarment where such a verdict is demanded by the evidence. **Wernimont v. State**, 101 App. 210 (142 S. E. 194, Ann. Cas. 1913D, 1156)."

The decision under consideration is not in conflict with that of **James v. State**, 61 Ga. App. 860 (7 S. E. 2d 398), as asserted by Appellant. On the contrary it is in complete harmony therewith. In the latter case the Court of Appeals of Georgia had before it the question of the denial by the trial court of the demand of the Respondent for a jury trial, and his trial in lieu thereof by a panel of five judges of the trial court. In reversing the decision of the trial court, the Court of Appeals did no more than to hold that the demand of the accused for a trial by a jury should have been granted.

Appellant has either overlooked or neglected to call to this Court's attention, the decision of the identical court

upon review of the retrial of the identical disbarment case, wherein the Court of Appeals of Georgia held:

> "No issue of fact having been made by the evidence, the court did not err in directing the jury to return a verdict disbarring the respondent." **James v. State**, 73 Ga. App. 834 (6) (38 S. E. 2d 125).

See also the authorities cited in the preceding subdivision.

The decision *sub judice* is wholly consonant with the applicable and controlling law and in nowise departs from any relevant precedent, or the accepted and usual course of judicial proceedings.

Moreover, it appears that Appellant has misconceived the jurisdictional requirements which must be met in order to invoke the jurisdiction of this Honorable Court for the review of state court decisions.

Title 28, U. S. C. A. 1254 (1) and Rule 19 (1) (b) of the Rules of the Supreme Court, Title 28, U. S. C. A., do not represent any authority for the instant petition. Such authorities relate exclusively to petitions for Writs of Certiorari to United States Courts of Appeals.

The authority for review by this Honorable Court of a decision of a state court of last resort by writ of certiorari is found in Title 28, U. S. C. A. 1257 (3) and Rule 19 (1) (a) of the Rules of the Supreme Court, Title 28, U. S. C. A., by virtue of which it would appear academic that it is essential to the invocation of the jurisdiction of this Court that a substantial federal question must have been properly raised in the state court proceedings. **Equitable Life Assurance Society v. Brown**, 187 U. S. 308, 311, 47 L. Ed. 190, 23 Sup. Ct. 123; **Zucht v. King**, 260 U. S. 174, 67 L. Ed. 194, 43 Sup. Ct. 24; **Palmer Oil Corporation v. Amarado Corporation**, 343 U. S. 390, 96 L. Ed. 1022, 72 Sup. Ct. 842.

As appears from the Petition and the Record, no federal question, substantial or insubstantial, was raised properly, or in any other manner, before the trial court or either of the state review courts, and no one of such courts has made any determination of any such federal question. The decision of the state court is based wholly on non-federal grounds which are independently adequate to support the judgment rendered, and which in no manner involve the resolution of any federal question or the interpretation of any federal statute or constitutional provision.

CONCLUSION.

We respectfully submit that the petition does not present any federal question, is wholly devoid of merit and should be denied.

Respectfully submitted.

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